

**United States Department of Labor
Employees' Compensation Appeals Board**

R.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oak Lawn, TX, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 11-879
Issued: October 14, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 22, 2011 appellant filed a timely appeal from the December 28, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied his request for a hearing. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision.

ISSUE

The issue is whether OWCP properly denied appellant's request for a hearing.

FACTUAL HISTORY

On April 24, 2003 appellant, a 67-year-old letter carrier, sustained an injury in the performance of duty when he was involved in an automobile accident. OWCP accepted his claim for cervical and left shoulder strains. It also accepted appellant's claim for lumbar sprain, degeneration of lumbar or lumbosacral intervertebral disc and lumbar spinal stenosis.

¹ 5 U.S.C. § 8101 *et seq.*

In a decision dated November 6, 2008, OWCP denied appellant's claim that he sustained a recurrence of disability beginning August 27, 2008.

On July 29, 2010 appellant requested an oral hearing before an OWCP hearing representative. He submitted two medical reports to show that he was taken off work in August 2008. On September 23, 2010 appellant again requested an oral hearing.

In a decision dated December 28, 2010, OWCP denied appellant's request for a hearing. After noting that FECA was unequivocal in setting a 30-day time limitation on requesting a hearing, OWCP denied his request as follows:

"The record shows that the decision of the district office was rendered on November 6, 2008 and your request for an oral hearing to the Branch of Hearings and Review was postmarked July 29, 2010. Since your request for an oral hearing was not made within 30 days, you are not, as a matter of right, entitled to an oral hearing or a review of the written record on your case. Preliminary review of your case record establishes that [OWCP] advised you by letter dated November 19, 2008 of the need to follow your appeal rights if you disagreed with the denial of your compensation. They also advised of such by multiple telephone calls, including those dated November 20 and 25, 2008, January 29 and February 20, 2009. However, although you advised [OWCP] that you would appeal, no timely request for a hearing or reconsideration was received by [OWCP]. Unfortunately, as you did not request a hearing within 30 days of the decision, there is no basis upon which to grant you an oral hearing at this time."

On appeal, appellant submits copies of his two requests for an oral hearing. He states that he also submitted claims for compensation on account of disability for the period August 27 to November 20, 2008, which forms were timely and stamped as received by the employing establishment and OWCP.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA provides:

"Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."²

The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.³ OWCP has

² 5 U.S.C. § 8124(b)(1).

³ 20 C.F.R. § 10.616(a).

discretion, however, to grant or deny a request that is made after this 30-day period.⁴ In such a case it will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.⁵

ANALYSIS

On November 6, 2008 OWCP denied appellant's claim that he sustained a recurrence of disability beginning August 27, 2008. Appellant had 30 days from the date of that decision or until December 8, 2008,⁶ to make a timely request for a hearing. Because his July 29 and September 23, 2010 requests were untimely, the Board finds that OWCP properly found that he was not entitled to a hearing as a matter of statutory right.

OWCP had discretion, nonetheless, to grant appellant's request. But it does not appear from the December 28, 2010 decision that OWCP exercised that discretion or if it did, it did not advise him with reasons. Rather, it denied appellant's request solely on the grounds that it was untimely: "Unfortunately, as you did not request a hearing within 30 days of the decision, there is no basis upon which to grant you an oral hearing at this time." The Board has carefully reviewed the December 28, 2010 decision and finds no indication that OWCP considered whether to grant a discretionary hearing.

The Board will therefore set aside the December 28, 2010 decision and remand the case for a proper exercise of OWCP's discretion and an appropriate final decision on appellant's untimely request. Should OWCP decide to deny a discretionary hearing, it must so advise appellant with reasons.

CONCLUSION

The Board finds that OWCP failed to exercise its discretion when it denied appellant's untimely request for a hearing.

⁴ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁵ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁶ December 6, 2008 was a Saturday.

ORDER

IT IS HEREBY ORDERED THAT the December 28, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: October 14, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board